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No. 90-1102

IN THE

Supreme Court of the United States

October Term 1990

ROBERT E. GIBSON

Petitioner,

v.

THE FLORIDA BAR, *et al.*

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RULES REGULATING THE FLORIDA BAR

MISCELLANEOUS

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I

THE FLORIDA BAR'S PROCEDURES MEET CONSTITUTIONAL STANDARDS.

Petitioner does nothing more than rehash issues already resolved by this Court in *Chicago Teachers' Union v. Hudson*, 475 U.S. 292 (1986) and *Keller v. State Bar of California*, 110 S.Ct. 2228 (1990). In direct response to this Court's opinion in *Hudson*, respondent, The Florida Bar ("the Bar"), adopted a comprehensive set of procedures governing legislative activities of the Bar, objections to such activities,

arbitration of such objections, and escrowing of the objecting member's dues. Those procedures are set out verbatim in footnote 8 to the lower court's opinion. [Pet. App. 7a] Petitioner challenges those procedures on the grounds that they fail to meet constitutional standards as announced by this Court in *Hudson* with respect to the collection, notice and objection procedures. With respect to each such ground, the Bar's procedures fall squarely within the requirements of *Hudson* and *Keller*.

A. This Court has not required an "advance reduction" of dues in the sense suggested by petitioner and should not do so.

The Bar's procedure allows the collection of 100 percent of a member's dues. However, immediately upon the filing of a timely objection, the Bar must deposit in an interest bearing escrow account that pro rata share of an objecting member's dues which is attributable to the legislative activities objected to. Petitioner argues that *Hudson* requires not only an escrow of the challenged funds, but in addition to the escrow, an "advance reduction" of dues. In support of its position, petitioner cites *Hudson*, in which this Court held the union's procedures inadequate despite the fact that it had established both an advance reduction in dues and a 100 percent escrow.

Petitioner reads too much into the *Hudson* opinion. While this Court discussed an advance reduction in dues because the union in that case had such a reduction, the Court never held an advance reduction to be necessary. To the contrary, in the Court's summary of constitutional requisites, advance reduction of dues is conspicuously absent:

> We hold today that the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.

Chicago Teachers' Union v. Hudson, supra at 475 U.S. 310.

A requirement that the Bar provide an advance reduction of dues would be both burdensome and impracticable. Such a requirement would be of little significance at all if The Florida Bar were advised by the Supreme Court of Florida, in pending proceedings, noted *infra*, that the Bar has no authority to engage in activities beyond the *Keller* scope. Otherwise, such requirement would be burdensome because of the necessity for the Bar to engage in a constitutional analysis and an accounting before taking a position on any measure and, presumably, before modifying such position on any measure, a difficult if not impossible task given the dynamics of the legislative process. In addition, legislative issues will inevitably arise after dues have already been collected.

The suggestion that an advance reduction of dues should be required ignores the constitutional principles which underlie the entire question before the Court. In *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 782, 52 L.Ed. 2d 261 (1977), this Court upheld the constitutionality of compulsory dues collection. The constitutional infirmities subsequently addressed in *Ellis v. Railway Clerks*, 466 U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984) and *Chicago Teachers' Union v. Hudson, supra*, were not in the collection of dues, but in their expenditure. The remedies were designed to ensure that dues already collected were not spent over objection for constitutionally impermissible purposes.

Any notion that an advance reduction is required was disabused by this Court's recent opinion in *Keller v. State Bar*

of California, supra. For a state bar which cannot represent that it can properly engage in any activities beyond *Keller's* scope, and whose ability to do so is at issue before its parent court, there is no practical opportunity for advance dues reduction or to consult past expenditures. Given The Florida Bar in its present posture, an advance reduction of dues would necessitate a bill-by-bill, case-by-case analysis by the Bar. In *Keller* the Court dismissed the suggestion that such an analysis was necessary, stating:

> In declining to apply our *Abood* decision to the activities of the State Bar, the Supreme Court of California noted that it would entail "an extaordinary burden . . . . The bar has neither time nor money to undertake a bill-by-bill, case-by-case Ellis analysis, nor can it accept the risk of litigation every time it decides to lobby a bill or brief a case." 47 Cal. 3d, at 1165-1166. 767 P.2d at 1028. In this respect we agree with the assessment of Justice Kaufman in his concurring and dissenting opinion in that court:
>
> > [C]ontrary to the majority's assumption, the State Bar would not have to perform a three-step Ellis analysis prior to each instance in which it seek to advise the Legislature or the courts of its views on a matter. Instead, according to [Teachers' v.] Hudson, [475 U.S. 292 (1986)] 'the constitutional requirements for the [Association's] collection of . . . fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pendings.' *Id.* at 310.
>
> * * *

> We believe an integrated bar could certainly meet its *Abood* obligation by adopting the sort of procedures described in *Hudson*.

Id. at 2237.

B. The Florida Bar provides an adequate explanation of the basis for the amount of dues assessed.

Petitioner contends that The Florida Bar violates constitutional standards by failing to provide adequate timely information about the basis for dues. Petitioner erroneously states that the only explanation given by the Bar is "periodic notices that the Bar has taken a legislative position." The Rules Regulating The Florida Bar require notice of each stage of the process of developing the budget and notice of the budget itself. [Res. App.][1] In addition, the Bar annually publishes a complete breakdown of expenditures by specific category, including legislation, giving percentage of the total budget and percentage and dollar amount of dues devoted to each category. That presentation includes the specific per capita member cost of The Florida Bar's legislative programming. [Res. App.][2] The requirement for notice of the budget breakdown is in addition to the requirement for notice of legislative positions. That notice must be published in The Florida Bar News, a publication sent to every member of the Bar, in the issue immediately following the Board meeting at which such positions are adopted. Rule 2-9.3, Rules Regulating The Florida Bar. [Res. App.]

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[1]The Rules — specifically Bar Rules 1-7 and 2-6 — were adopted as an opinion of the Florida Supreme Court at 494 So.2d 977 (Fla. 1986).

[2]The excerpts from the Bar Journal were before the Eleventh Circuit on an undisputed motion to take judicial notice.

It is difficult to understand how petitioner reaches the conclusion that The Florida Bar provides less information than did the union in *Hudson*. In that case, the union provided no information on any expenditures except the five percent of dues which the union used for legislative advocacy. The Florida Bar, on the other hand, provides a breakdown of all dues expenditures and the potential dues reimbursement figure for prospective dissenters.

C. The Florida Bar's procedure for registering objections to legislative positions meets constitutional standards.

The Rules Regulating The Florida Bar provide that:

> Any active member of The Florida Bar may, within forty-five (45) days of the date of publication of notice of adoption of a legislative position, file with the executive director a written objection to a particular position on a legislative issue. Failure to object within this time period shall constitute a waiver of any right to object to the particular legislative issue. Rules Regulating The Florida Bar, 2-9.3(c).

[Pet. App.] Petitioner asserts that requiring an objecting member to object on an issue-by-issue basis is unconstitutional because it forces such member to identify his or her own political positions. The lower court rejected the contention, noting that the Florida rule does not require the objector to disclose his or her position on an issue, only to identify the issue as one alleged to be outside the scope of permissible expenditures. Thus, the burden on the objecting member is minimal. Such a requirement does not disclose the objector's political position on any issue and would be no more likely to subject the objector to political repercussion than a general objection to all lobbying. On the other hand, if a member were

permitted to make a general objection, an unfair burden would be placed upon all non-objecting members of the Bar. The Bar would be faced with the choice of either making a full refund to objecting members, regardless of the merit of their objection, or funding the cost of a full arbitration proceeding on every presumptively valid issue on which the Bar chose to take a position.

D. Florida Bar Procedures give members adequate notice and timely opportunity to object on legislative matters, for appropriate reimbursement.

Petitioner complains that the Bar does not give notice and an opportunity to object prior to collection of dues. As noted above, the Bar does provide members with a detailed breakdown of dues expenditures prior to collection, and provides members with an opportunity to object and have an appropriate portion of their dues escrowed for possible reimbursement. Under proposed Florida Bar rule amendments consistent with the lower court's opinion, such reimbursement would include interest at the statutory rate, calculated from the date of receipt of the objector's dues payment.[3]

The impracticability of pre-collection notice is apparent since the Bar cannot know what political or legislative issues will arise after the collection of dues. Based upon petitioner's premise, the Bar would be prohibited from taking a position on any issue after collection of dues regardless of how compelling the Bar's interest in such issue might be. Constitutional standards do not necessitate the unreasonable consequences demanded by petitioner.

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[3] *The Florida Bar Re Petition to Amend Rules Regulating The Florida Bar — Bylaws 2-3.10 and 2-9.3, petition filed,* Un-numbered (Sup. Ct. Fla., Jan. 3, 1991)

II

THE CIRCUIT COURT DID NOT ERR IN DECLINING TO REMAND FOR ASSESSMENT OF RETROACTIVE MONETARY DAMAGES.

For the first time in this action, petitioner sought retroactive damages from the Circuit Court, asking the Court to remand for the assessment of a refund of a portion of dues which he had already paid. The Circuit Court declined to do so, noting that the request was being made at the appellate level for the first time. The Court noted that no request for refund or monetary damages was included in the complaint and no evidence on the issue was introduced in the District Court either at trial or on remand. Petitioner argues that even though the complaint did not specifically seek monetary damages, a complaint is deemed to include a prayer for all relief to which a plaintiff is entitled. While petitioner is correct as to this general principle of law, he misses the point underlying the circuit court's refusal to remand. It is a fundamental principle of appellate law that a point cannot be raised for the first time on appeal. *Fries v. Chicago and Northwestern Trans. Co.*, 909 F.2d 1092 (7th Cir. 1990); *U.S. v. Bigler*, 817 F.2d 1139 (5th Cir. 1987); *Sanders v. Int'l Ass'n. of Bridge, etc.*, 546 F.2d 879 (10th Cir. 1976).

Even if the petitioner had raised the issue of retroactive moentary relief at the trial level, he would not have been entitled to it. The Eleventh Amendment to the United States Constitution bars federal jurisdiction to award retroactive damages against states or state agencies. *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed 2d 662 (1974); *Pennhurst State School & Hospital v. Terry Lee Halderman*, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed 67 (1983). Florida has not

waived sovereign immunity for purposes of federal jurisdiction. Section 768.28(16), Florida Statutes: *Florida Department of Health, etc. v. Florida Nursing Homes Assn.*, 450 U.S. 147, 101 S.Ct. 1032, 67 L.Ed. 132 (1981).

For purposes of the Eleventh Amendment, The Florida Bar is clearly a "state agency". By order of the Florida Supreme Court, pursuant to Article V, Section 15, Florida Constitution, The Florida Bar is "an official arm of the Court." Chapter 1, Rules Regulating The Florida Bar. See *Krempp v. Dobbs*, 775 Fed.2d 1319 (5th Cir. 1985). The fact that Gibson is seeking a rebate of previously paid dues is of no consequence since the Eleventh Amendment bars rebates of funds exacted by a state under compulsion. See *Smith v. Reeves*, 178 U.S. 436, 20 S.Ct. 919, 44 L.Ed 2d 1140 (1988); *Great Northern Life Ins. Co. v. Read*,322 U.S. 47, 64 S.Ct. 873, 86 L.Ed. 1121 (1944).

III

THE ISSUES RAISED BY PETITIONER ARE NOT RIPE FOR CONSIDERATION BY THIS COURT.

This Court has instructed the Federal judiciary to exercise restraint in reviewing state statutes in the interest of comity. The concept of allowing states an adequate opportunity to interpret their own laws prior to federal intervention was initially advanced in the *Pullman* abstention doctrine. *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941). While *Pullman* may not technically apply in the circumstances of the instant case, its underlying principle does.

The Florida Bar, and other bar associations across the country, have acted expeditiously to bring their procedures into

compliance with the *Hudson* requirements. In the interest of both comity and judicial efficiency the District Court reserved judgment in this case in order to allow the Florida Supreme Court time to adopt new rules. Those rules were adopted and approved by the District Court prior to this Court's decision in *Keller*. Petitioners now seek reversal by this Court before the Bar and Florida Supreme Court have had breathing room to consider the impact of *Keller*.

As noted above, the Bar believes its current rules are in line with *Hudson* and *Keller*. Nevertheless, in two separate original proceedings before the Supreme Court of Florida, the post-*Keller* authority of The Florida Bar to engage in political and ideological activities under state law may be clarified[4] and further amendment of its member dissent procedures is in process.[5] The Respondent cannot faithfully represent to this Court that The Florida Bar's present rule has the continued support of its own parent agency since rendition of *Keller*. Consequently, this Court should allow Florida and other states an adequate opportunity to review their rules in light of *Keller* prior to revisiting the issue.

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[4]*The Florida Bar, In Re: David P. Frankel, petition filed,* No. 76,853 (Sup. Ct. Fla., Oct. 29, 1990).

[5]*The Florida Bar Re Petition to Amend Rules Regulating The Florida Bar — Bylaws 2-3.10 and 2-9.3, petition filed,* Un-numbered (Sup. Ct. Fla., Jan. 3, 1991).

CONCLUSION

For the foregoing reasons, The Florida Bar respectfully urges that the Petition for Certiorari be denied.

Respectfully submitted,

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